

FEDERAL MARITIME COMMISSION

FACT FINDING INVESTIGATION NO. 25- PRACTICES OF TRANSPACIFIC STABILIZATION AGREEMENT MEMBERS COVERING THE 2002-2003 SERVICE CONTRACT SEASON

ORDER OF INVESTIGATION

Pursuant to the Shipping Act of 1984, 46 U.S.C. app. 1701 *et seq.* ("1984 Act"), the Federal Maritime Commission ("Commission") is responsible for administering a non-discriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States. Section 10 of the Act contains specific prohibitions against conduct which would conflict with this system of common carriage.

On May 10, 2002, the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA") and the International Association of NVOCCs, Inc. ("IANVOCC") filed a joint petition, Petition No. P1-02, in which they alleged that members of the Transpacific Stabilization Agreement ("TSA") have engaged in violations of certain section 10 prohibitions. The petitioners assert that TSA members engaged in a concerted practice of discrimination against non-vessel-operating common carriers ("NVOCCs") regarding the negotiation of service contracts and the rates established therein for the 2002-2003 contracting season. Specifically, the petitioners alleged that TSA members had entered into an internal agreement, which they subsequently executed, to complete the negotiation and signing of service contracts with proprietary shippers before commencing negotiation of service contracts with NVOCCs. The petitioners further alleged that TSA members had colluded to charge NVOCCs significantly higher rates than assessed to proprietary shippers for the same services. The manner in which TSA members allegedly implemented this agreement was through the discriminatory subjection of NVOCCs, through their service contracts, to general rate increases ("GRIs") and a peak season surcharge ("PSS"), which were not applied to proprietary shippers through their service contracts.

Upon the filing of Petition No. P1-02, the Commission initially directed its staff to secure and assess additional information regarding TSA member practices during the 2002-2003 contracting season. During the pendency of this informal investigation, TSA and its members announced a second GRI during this contracting season to become effective August 19, 2002. If the petitioners' allegations of concerted action are correct, it would appear that this second GRI was agreed to among TSA members with the knowledge that certain shippers would be exempt from the increase by the terms of their 2002-2003 service contracts. In view of the information presently available and with due regard for the seriousness of the allegations, the Commission has determined to commence this non-adjudicatory investigation to gather additional facts. Specifically, the Investigative Officer named herein is to develop a record on various practices allegedly engaged in by TSA and its members, either individually or collectively, during the 2002-2003 contracting season, including but not limited to:

1. Refusals to deal with NVOCCs until the substantial completion of negotiations with proprietary shippers;
2. The discriminatory application in NVOCC service contracts of GRIs and/or a PSS while waiving or otherwise not requiring similar application in proprietary shipper service contracts;
3. The extent and degree to which the rate increases and service contract policies, practices, and guidelines of TSA have been, and remain, voluntary and non-binding upon its respective members;

4. The extent and degree to which TSA and its members have maintained and transmitted to the Commission full, complete, and accurate minutes of all meetings required to be filed with the Commission; and

5. The development and utilization of open-ended provisions that permit the unilateral implementation of GRIs and/or a PSS by TSA members in their service contracts with NVOCCs, without genuine further negotiation, while waiving or not requiring similar provisions in their service contracts for proprietary shippers.

The Investigative Officer is to report to the Commission within the time specified herein, with recommendations for any further Commission action, including any formal adjudicatory, injunctive, or rulemaking proceedings, warranted by the factual record developed in this proceeding.

Interested persons are invited and encouraged to contact the Investigative Officer named herein, at (202) 523-5724 (Phone) or (202) 275-0518 (Fax), or by e-mail at nvopetitiontsa@fmc.gov should they wish to provide testimony or evidence, or to contribute in any other manner to the development of a complete factual record in this proceeding.

THEREFORE, IT IS ORDERED, That pursuant to sections 5, 8, 10, 11, 12 and 15 of the Shipping Act of 1984, 46 U.S.C. app. 1704, 1707, 1709, 1710, 1711 and 1714, and Part 502, Subpart R of Title 46 of the Code of Federal Regulations, 46 CFR 502.281, *et seq.*, a non-adjudicatory investigation is hereby instituted into the practices of TSA and its members, to develop the issues set forth above and to provide a basis for any subsequent regulatory, adjudicatory or injunctive action by the Commission.

IT IS FURTHER ORDERED, That the Investigative Officer shall be Commissioner Joseph E. Brennan of the Commission. The Investigative Officer shall be assisted by staff members as may be assigned by the Commission's Executive Director and shall have full authority to hold public or non-public sessions, to resort to all compulsory process authorized by law (including the issuance of subpoenas *ad testificandum* and *duces tecum*), to administer oaths, to require reports, and to perform such other duties as may be necessary in accordance with the laws of the United States and the regulations of the Commission:

IT IS FURTHER ORDERED, That the Investigative Officer shall issue a report of findings and recommendations no later than January 17, 2003, and interim reports if it appears that more immediate Commission action is necessary, such reports to remain confidential unless and until the Commission provides otherwise:

IT IS FURTHER ORDERED, That this proceeding shall be discontinued upon acceptance of the final report of findings and recommendations by the Commission, unless otherwise ordered by the Commission: and

IT IS FURTHER ORDERED, That notice of this Order be published in the Federal Register.

By the Commission.

Bryant L. VanBrakle
Secretary